

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANDRE DWAYNE BENDER,

Defendant-Appellant.

UNPUBLISHED

March 22, 2007

No. 265373

Wayne Circuit Court

LC No. 05-003173-01

Before: Jansen, P.J., and Neff and Hoekstra, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for felonious assault, MCL 750.82, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was originally sentenced to two years' imprisonment for the felony-firearm conviction, and 23 to 48 months' imprisonment for the felonious assault conviction. Following a resentencing hearing, the trial court reduced defendant's felonious assault sentence to 199 days in jail, time served. We affirm.

Defendant's convictions resulted from an argument about a cell phone that escalated into a shooting incident in the early morning hours of March 15, 2005. The four major participants were Ronique Phillips (Ronique), her mother, LaShawn Phillips-Beasley (LaShawn), her brother, Vernell Phillips (Vernell) and her boyfriend, the defendant.

When LaShawn, Vernell and Ronique confronted defendant in an attempt to retrieve LaShawn's phone from defendant, a scuffle broke out between defendant, two other men and Vernell. At some point, defendant produced a gun and began walking toward Vernell while pointing the gun at him. Defendant shot the gun once up in the air. Vernell got into his mother's car and LaShawn got between defendant and the car. Defendant then tried to shoot around her at the car and Vernell. LaShawn got in the car and as she and Vernell were driving away defendant shot at the car hitting the rear passenger door. No one was hit by the gunshots. At trial Ronique and defendant gave different versions of the events¹, but the jury obviously believed LaShawn and Vernell, and convicted defendant as noted.

¹ Ronique's trial testimony differed markedly from the statement she gave to police on the night of the incident in which she essentially agreed with the version of the facts related by her mother and brother.

The only issue raised on appeal is the sufficiency of the evidence. Defendant claims that the prosecution failed to establish that he possessed a gun and that there is no evidence that he instigated the assault against Vernell or LaShawn.

When reviewing a claim that insufficient evidence was presented to support a defendant's conviction, we "must view the evidence in [the] light most favorable to the prosecution" to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005).

The elements of felonious assault are (1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery. The elements of felony-firearm are that the defendant possessed a firearm during the commission of, or the attempt to commit, a felony. [*People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999), citing *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996).]

This case was simply a credibility contest. At trial, LaShawn definitively testified that defendant possessed a gun, fired the gun into the air, and attempted to shoot Vernell despite the fact that she stood in the way. Vernell corroborated LaShawn's testimony. Vernell admitted on cross-examination that he had testified at the preliminary examination that he could not identify the shooter, but the statement he gave to the police on the day of the shooting identified defendant as the shooter. Ronique, on the other hand, expressly denied at trial that defendant was the shooter. Ronique claimed that defendant did not possess a gun during the incident. Ronique admitted that she heard gunshots, but testified that no one involved in the argument shot a gun. Ronique claimed that she made a false police report identifying defendant as the shooter because LaShawn threatened to sue for custody of her children.

A reasonable jury could determine beyond a reasonable doubt that defendant committed the offenses based on this evidence. Both Vernell and LaShawn testified at trial that defendant possessed a gun and deliberately shot at Vernell. Although Ronique denied at trial that defendant had committed the shooting, she originally implicated defendant in the charged offenses in her statement to the police. At the preliminary examination Vernell recanted his original statement to the police, but later revived it at trial. It is the sole province of the jury to judge the credibility of the witnesses. *People v Lemmon*, 456 Mich 625, 637; 576 NW2d 129 (1998). Defendant's challenge to the sufficiency of the evidence fails.

Affirmed.

/s/ Kathleen Jansen

/s/ Janet T. Neff

/s/ Joel P. Hoekstra